

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

Modifying the Commission's Process to Avert)
Harm to U.S. Competition and U.S. Customers)
Caused By Anticompetitive Conduct)

IB Docket No. 05-254

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REPLY COMMENTS OF MCI, INC.

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October 27, 2005

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REPLY COMMENTS OF MCI, INC.

MCI, Inc. ("MCI") submits these reply comments in response to the Commission's Notice of Inquiry ("NOI") in the above-referenced proceeding.¹ As MCI explained in its initial comments, it is critical that the Commission protect U.S. consumers and carriers from foreign carriers that attempt to abuse their market power in order to impose unilateral rates, terms or conditions on U.S. carriers. Although some commenters have attempted to shift the Commission's focus away from the core issues raised by the NOI, it is clear that there is a significant and growing problem with unjustified blocking by foreign carriers. MCI therefore renews its support for the Commission's attention to this matter and urges the Commission to continue to educate itself about this important issue and to launch a further proceeding to adopt deterrents and remedies designed to prevent further abuses of market power by foreign carriers.

I. INTRODUCTION AND SUMMARY

As MCI explained in its initial comments, one of the Commission's core functions is to protect U.S. consumers from unjust and unreasonable practices. In the case of international

¹ *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused By Anticompetitive Conduct*, Notice of Inquiry, 20 FCC Rcd 14096 (FCC 05-152) (2005) ("NOI").

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traffic, this translates into preventing carriers that enjoy market power on particular routes from exploiting that market power and unilaterally imposing on other carriers rates, terms or conditions that are unjust or unreasonable. In essence, the Commission's role is to ensure that the market functions properly and that carriers do not abuse their market power by disrupting or circumventing commercial negotiations or agreements.

Not surprisingly, many commenters agreed with this seemingly uncontroversial position. A few commenters, however, attempted to deflect the Commission's attention from the central issue of preventing abuses of market power by raising tangential – and ultimately meritless – arguments regarding the rates that U.S. carriers charge their customers and claims that FCC actions designed to protect U.S. carriers and consumers from abuses of market power by foreign carriers somehow impinge on the authority of foreign regulators.

The Commission should not allow these make-weight arguments to distract it from the central issues raised in the NOI. Rather, the Commission should remain focused on addressing the significant and growing problems involving circuit blocking by foreign carriers, understanding the complex and quickly-evolving international communications market and protecting U.S. consumers and carriers from whipsawing. MCI therefore urges the Commission to follow up its NOI with further investigation of abuses of market power by foreign carriers, possibly in the context of further proceedings on the issues raised in the NOI.

II. DISCUSSION

A. Whipsawing Continues to be a Serious Problem That Harms U.S. Consumers and Carriers

The comments filed in response to the NOI demonstrate that whipsawing remains a significant problem that demands attention from the Commission. Several parties shared MCI's

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concerns regarding anticompetitive whipsawing by foreign carriers.² As Sprint Nextel noted, “[m]arket conditions have evolved to a state where . . . anticompetitive tactics by foreign carriers that capitalize on the high level of competition among U.S. carriers, can be effective.”³ This is particularly true given that “competition has not yet developed sufficiently in many countries to remove potential whipsaw concerns.”⁴ As a result, foreign carriers are able to engage in anticompetitive tactics that result in higher rates for U.S. consumers and lower call quality.⁵

As MCI and other parties explained, the Commission must act to improve its anti-whipsawing policies and provide effective relief against threatened (or actual) circuit disruptions designed to coerce U.S. carriers into paying increased settlement rates.⁶ To this end, several commenters joined MCI in urging the Commission to adopt expedited interim measures that would allow it to act swiftly to counteract threats of whipsawing by foreign carriers.⁷ Among other measures, the Commission must ensure that it is able to take swift and immediate action in

² See, e.g., Comments of AT&T Corp. at 2-6 (“AT&T”); Comments of Sprint Nextel Corporation at 1 (“Sprint Nextel”); Comments of Jamaica Competitive Telecoms Association and Reliant Enterprise Communications Ltd at 2 (Oct. 5, 2005) (“Reliant”) (supporting rules that encourage fair competition and stating that any type of circuit blockage designed to force rates up or whipsaw other carriers are “unacceptable.”); see also Comments of the Malaysian Communications and Multimedia Commission at 1 (“MCMC”) (acknowledging that “foreign carriers with market power could have a possibility to misuse their market power which could result in substantial lessening of competition in a communications market.”). (Unless otherwise indicated, all comments cited herein were filed in IB Docket No. 05-254 on October 7, 2005.)

³ Sprint Nextel at 1.

⁴ AT&T at 3.

⁵ *Id.* at 1-2.

⁶ See Comments of MCI at 10-13 (“MCI”); see also AT&T at 4-5; Sprint Nextel at 2.

⁷ See MCI at 8-10; see also AT&T at 12-16; Sprint Nextel at 3-6; Reliant at 2.

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response to whipsawing or threats of whipsawing. As Reliant explained, the FCC must be able to take “unilateral action” in response to circuit blockages that are intended to circumvent commercial agreements or raise rates without proper notification and discussion.⁸

None of the arguments raised in the comments detract from these fundamental facts.

B. Allegations that U.S. Carriers Fail to Pass Rate Decreases Through to End Users are Both False and Irrelevant

Some parties argue that U.S. carriers are not passing reductions in foreign termination rates on to consumers.⁹ As MCI explained in its initial comments, these allegations simply are not true. In fact, given the fierce competition on the U.S. end of the U.S.-international market, carriers earn only minimal margins and any attempt to charge above-market rates would be swiftly punished in the marketplace as customers would switch to competing providers.¹⁰ The effects of competition are reflected in the FCC data cited by AT&T, which show that prices charged by U.S. carriers have fallen far faster than the settlement rates U.S. carriers pay to foreign providers.¹¹

Ignoring the objective data and the Commission’s own conclusion that the reductions in settlement rates are fully reflected in the prices charged by U.S. carriers,¹² some parties persist in their attempts to perpetuate the myth that U.S. carriers are not passing reductions in termination

⁸ Reliant at 2.

⁹ Comments of Cable & Wireless Jamaica at 15 (“C&W Jamaica”); Comments of the Caribbean Association of National Telecommunications Organizations at 11 (“CANTO”).

¹⁰ See MCI at 14-15; see also Sprint at 7.

¹¹ AT&T at 19-21 (noting that U.S. carrier price reductions exceeded reductions in their settlement costs by more than 160% between 1997 and 2003).

¹² *International Settlement Rates*, Report and Order, 12 FCC Rcd 19806, ¶ 270 (1997) (“*Bennchmarks Order*”); *International Settlements Policy Reform, International Settlement Rates*, First Report and Order, 19 FCC Rcd 5709, ¶¶ 72-73 and n.179 (2004) (“*ISP R&O*”).

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rates on to their customers.¹³ For example, some of the Jamaican commenters claim that U.S. international carrier rates have ranged from \$0.22¹⁴ to \$0.32 per minute, or higher.¹⁵ The Jamaican Ministry also appears to believe that U.S. carriers are charging rates that are \$0.24 higher than the settlement rates they are paying Jamaican carriers to terminate calls from the United States.¹⁶ In MCI's case, at least, these claims are demonstrably false.

In an effort to lay these claims to rest, MCI is providing the Commission confidential business information regarding traffic on the U.S.-Jamaica route from May of 2005 (the month during which Jamaican carriers threatened, and ultimately carried out, circuit blockages).¹⁷ As MCI and others have explained, most of the major carriers' traffic on this route is wholesale.¹⁸ This is borne out by MCI's data from May 2005, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

¹³ See, e.g., CANTO at 11; C&W Jamaica at 15; Comment by the Jamaican Ministry of Commerce, Science & Technology at 8-9 ("Ministry"); Digicel USA Inc. and Mossel (Jamaica) Ltd Comments at 3-4 ("Digicel") (collectively, the "Jamaican commenters").

¹⁴ C&W Jamaica at 15.

¹⁵ Ministry at 8-9. Digicel claims that U.S. carriers are charging up to \$4.70 per minute for calls to terminating to wireless phones in Jamaica, while paying a termination charge of "just under USD \$0.15." Digicel at 4.

¹⁶ See Ministry at 8, ¶¶ 17-18.

¹⁷ See Confidential Attachment A.

¹⁸ See, e.g., Sprint Nextel at 2 (estimating that 80 to 90 percent of the international traffic carried by Sprint is wholesale).

¹⁹ See Confidential Attachment A. The remaining traffic was attributable to mass market customers as well as enterprise and government contracts. These minutes generally were sold at rates higher than the wholesale rates listed in Attachment A. However, while some of these minutes were sold at the rates advertised on MCI's website or calling cards, many more were sold pursuant to contract rates. Enterprise and government contract rates vary from deal to deal.

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[REDACTED] [END CONFIDENTIAL] As these numbers make clear, MCI has not been earning rates or margins anywhere close to those alleged by the Jamaican commenters.²² Just as importantly, the data demonstrate that MCI could not have supported the rate increases that the Jamaican carriers imposed in May 2005 without passing the additional costs through to MCI's customers.²³

and MCI cannot easily ascertain the rates charged to each enterprise or government customer. MCI has confirmed, however, that these rates do not support margins even close to those claimed by the Jamaican commenters. Moreover, even if some of MCI's retail rates approached the numbers posited by the Jamaican commenters, the average of all rates charged to all MCI customers is clearly far below the rates alleged by the Jamaican commenters. This is particularly true given that less than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of MCI's traffic is attributable to retail customers. In addition, as noted above, competition in the market ensures that if MCI's retail rates are too high, customers will turn to other providers.

²⁰ See Confidential Attachment A. The specific rates varied by sales channel and by terminating Jamaican carrier. See *id.*

²¹ See *id.*

²² Although the Jamaican carriers did not know MCI's exact rates when they met with the FCC in May 2005, they knew or could have known the general level of rates charged by MCI. In fact, MCI provided general rate information in meetings with representatives of the Jamaican government. Despite this knowledge, and access to information about what carriers are charging for wholesale minutes on the open market, the Jamaican commenters persist in making claims about U.S. carriers' rates that are unsupported by the facts the commenters have at their disposal.

²³ The Jamaican carriers sought to increase international termination rates by \$0.03 per minute for calls terminating on the fixed (wireline) network in Jamaica and \$0.02 per minute for calls terminating to mobile users in Jamaica. See C&W Jamaica at 2. These increases resulted in termination rates that exceeded the prices MCI was charging many of its customers for carrying U.S.-Jamaica traffic. See Confidential Attachment A.

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Moreover, even if the claims about pass-throughs had any merit (which they do not), it is unclear how allegations regarding the prices that U.S. carriers charge U.S. consumers can be used to justify anticompetitive behavior by foreign carriers. To the extent the Commission is concerned about the rates U.S. carriers are charging their customers – and as explained above, there should be no cause for concern given the robust competition in the market – those concerns should be addressed through the FCC’s authority to regulate rates and prevent carriers from charging rates that are unjust or unreasonable.²⁴ It is hard to imagine any policy scenario in which an appropriate response to concerns over rates to U.S. customers would involve allowing or supporting anticompetitive behavior on the part of foreign suppliers, however. Regardless of how cost savings are passed through to customers, there can be no justification for foreign carriers’ attempts to abuse their market power in an effort to force U.S. carriers to accept unilateral changes to freely-negotiated commercial agreements.

C. The Commission Has the Authority and the Obligation to Act Against Anticompetitive Abuses of Market Power

Some commenters appear to believe that whipsawing can be justified if the change that the foreign carrier seeks to impose unilaterally is the product of a policy of a foreign government and that any action by the FCC to curtail such non-commercial behavior represents an affront to the authority of the foreign regulator.²⁵ Such arguments are misplaced and ignore several fundamental issues.

²⁴ See 47 U.S.C. § 201(b).

²⁵ See, e.g., CANTO at 7-9; Digicel at 2-3; Ministry at 4.

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First and foremost, the Commission unquestionably has the authority to exercise its jurisdiction over U.S. carriers to protect U.S. customers and carriers from anticompetitive behavior by foreign carriers.²⁶ The Commission does not exceed its authority “simply because a regulatory action may have extraterritorial consequences.”²⁷ Indeed, just as a foreign regulator has the authority to enforce policies that arguably result in increases in termination rates by carriers subject to its jurisdiction, so too the FCC has the authority to order U.S. carriers to stop payments, raise their termination rates or take other actions designed to deter whipsawing.²⁸

Moreover, as MCI has explained previously, not all attempts to increase foreign termination rates or change other commercial terms constitute illegal whipsawing. Rather, whipsawing occurs when a foreign carrier seeks to abuse its market power in an attempt to circumvent the negotiation process by unilaterally imposing changes to commercial agreements. A foreign carrier is free to negotiate a higher settlement rate designed to compensate it for increased universal service assessments imposed by the foreign carrier’s government. The carrier may not, however, attempt to rely on a dominant market position²⁹ to coerce U.S. carriers

²⁶ MCI at 3.

²⁷ *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999); see also *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. For Prevention of “Whipsawing” on the U.S.-Philippines Route*, Order on Review, 19 FCC Rcd 9993, ¶ 32 (2004) (“*Philippines Order on Review*”) (“[i]t is well-settled that [the FCC’s] authority over U.S.-international settlement rates and practices is not an assertion of extraterritorial regulation of foreign carriers; rather it is a constraint over U.S. carriers to protect the public interest.”).

²⁸ See, e.g., *Philippines Order on Review*, ¶¶ 32-33 (2004).

²⁹ Market dominance can be achieved by a single firm with market power, by a group of foreign carriers acting in concert, or as a result of actions by a foreign regulator. Regardless of the source of the market power, foreign carriers should not be permitted to abuse their dominant position to extract concessions from U.S. carriers.

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into accepting a rate increase by threatening to block the calls of any carrier that does not capitulate to its demands.

The reasons for a foreign carrier's rate increases are irrelevant to the question of whether the carrier is engaged in whipsawing. The issue is not whether, for example, the foreign regulator has the authority to require carriers subject to its jurisdiction to pay universal service assessments, or raise their termination rates. Instead, the issue is how the foreign carrier may go about recovering any increased costs from U.S. carriers.³⁰ When attempts to raise rates go beyond reasonable commercial practices and involve abuses of market power, the Commission can and should act to protect U.S. carriers and customers.

Finally, foreign regulators that are concerned about any anti-whipsawing actions the Commission may take may raise the issue in bi-lateral discussions with the FCC or in international fora. The FCC historically has been very active in the international arena and would undoubtedly be willing to work with other regulators to ensure pro-competitive regulatory policies.

³⁰ Accordingly, there is no reason to distinguish situations where foreign carriers have been "compelled to comply with the policy directives issued by the local Government" from other types of anticompetitive exercises of market power. *C.f.*, Digicel at 1.

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III. CONCLUSION

For the reasons set forth above and in MCI's initial comments, the FCC should act promptly to protect U.S. customers and U.S. carriers from the harms caused by the abuse of market power exercised when foreign carriers engage in harmful and anticompetitive circuit disruption.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sasha Field" followed by a slanted line and the initials "sfh".

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Confidential Attachment A

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